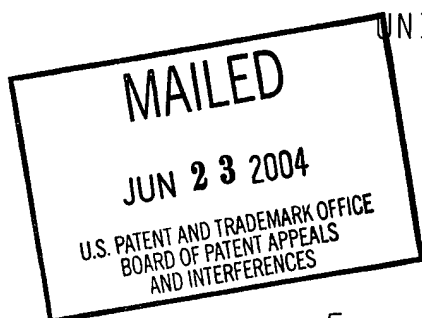


The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 22



UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* JAMES A. MICHAEL, DAVID T. FREDERICK  
and H. THOMAS GRAEF

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Appeal No. 2004-0387  
Application No. 09/384,650

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ON BRIEF

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Before OWENS, TIMM, and JEFFREY T. SMITH, *Administrative  
Patent Judges*.

JEFFREY T. SMITH, *Administrative Patent Judge*.

### *DECISION ON APPEAL*

Applicants appeal the decision of the Primary Examiner finally rejecting claims 40 to 67. We have jurisdiction under 35 U.S.C. § 134.<sup>1</sup>

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<sup>1</sup> In rendering this decision, we have considered Appellants' arguments presented in the Brief filed April 24, 2001 and the

**BACKGROUND**

Appellants' invention relates to a method performed with a medical item dispenser. The scope of Appellants' invention can be ascertained from representative claims 40, 52, 53 and 61, which are reproduced from the Brief below:

40. A method performed in connection with a dispenser, the dispenser including a dispenser module movably mounted in supporting connection with an enclosure, wherein the dispenser module includes a holder enabling holding of medical items, wherein the dispenser module further includes a dispenser mechanism, wherein the dispenser mechanism is selectively operable to dispense medical items from the holder, the method comprising:

(a) moving the dispenser module, while mounted, from a first position, wherein the dispenser module is within the enclosure, to a second position, wherein the holder extends outside the enclosure;

(b) adding or removing at least one medical item from the holder while the holder extends outside the enclosure; and

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(c) moving the dispenser module from the second position to the first position wherein the holder is within the enclosure.

52. A method performed in connection with a medical item dispenser, the dispenser including an enclosure, a door in operative connection with the enclosure, a path extending in the enclosure, wherein the path is in connection with a delivery area, whereby dispensed medical items are accessible to a user in the deliver area, the method comprising:

(a) providing a dispenser module movably mounted in supporting connection with the enclosure, wherein the dispenser module includes a holder enabling holding of medical items, and a dispenser mechanism selectively operable to dispense medical items from the holder at a dispense location positioned adjacent the path;

(b) moving the door of the enclosure from a closed position to an open position, wherein the holder is able to be moved outside the enclosure;

(c) moving the dispenser module while in supporting connection with the enclosure, from a first position, wherein the dispenser module is within the enclosure, to a second position, wherein the holder extends outside the enclosure;

(d) adding or removing at least one medical item from the holder while the holder extends outside the enclosure;

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(e) moving the dispenser module from the second position to the first position wherein the holder is within the enclosure; and

(f) closing the door.

53. A method performed in connection with a medical item dispenser apparatus including:

an enclosure, wherein the enclosure bounds an interior area, and wherein the enclosure includes an opening to the interior area;

a door in operative connection with the enclosure, wherein the door is movable between a closed position wherein the door closes the opening, and an open position wherein the door is disposed away from the opening;

a path extending in the enclosure, wherein the path is in connection with a delivery area, whereby dispensed medical items are accessible to a user in the delivery area;

a dispenser module, wherein the dispenser module is movably mounted in supporting connection with the enclosure, wherein the dispenser module includes a holder, wherein the holder enables holding the medical items therein, and a dispenser mechanism, wherein the dispenser mechanism is selectively operable to dispense medical items from the holder at a dispense location, and wherein the module is movable while mounted in supporting connection with the enclosure between a first position and a second position, wherein in the first position the module

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is within the enclosure and the dispense location is positioned adjacent the path, and wherein when the door is in the open position the dispenser module is movable to the second position, wherein in the second position the module extends through the opening and the holder is manually accessible, whereby the medical items may be added or removed therefrom;

the method comprising:

- (a) moving the door from the closed position to the open position;
- (b) moving the mounted dispenser module from the first position to the second position, wherein the holder extends outside the enclosure;
- (c) adding or removing at least one medical item from the holder while the holder extends outside the enclosure;
- (d) moving the mounted dispenser module from the second position to the first position wherein the holder is within the interior area; and
- (e) closing the door.

61. A method comprising:

- (a) providing an enclosure including a delivery area accessible from outside the enclosure;

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(b) providing a first dispenser module in the enclosure and in movably supporting connection with the enclosure through a first guide arrangement, wherein the first guide arrangement is adapted to guide the first dispenser module during movement, wherein the first dispenser module includes a plurality of first medical items and is selectively operative to dispense first medical items therefrom, wherein first medical items dispensed from the first dispenser module in the enclosure move to the delivery area;

(c) providing a second dispenser module in the enclosure and in movably supporting connection with the enclosure through a second guide arrangement, wherein the second guide arrangement is adapted to guide the second dispenser module during movement, wherein the second and first guide arrangements are interchangeably engageable to support either the first or second dispenser modules, and wherein the second dispenser module includes a plurality of second medical items and is selectively operative to dispense the second medical items therefrom, wherein second medical items dispensed from the second dispenser module in the enclosure move to the delivery area; and

(d) dispensing at least one of a first or second medical item to the delivery area.

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*CITED PRIOR ART*

As evidence of unpatentability, the Examiner relies on the following references:

Pitel et al. (Pitel)	4,023,704	May 17, 1977
Halvorson	4,847,764	Jul. 11, 1989
Blechl et al. (Blechl)	5,377,864	Jan. 3, 1995
Gardner et al. (Gardner)	5,445,294	Aug. 29, 1995
Williams	5,460,294	Oct. 24, 1995
Kraft et al. (Kraft)	5,502,944	Apr. 2, 1996
Higham et al. (Higham)	5,745,366	Apr. 28, 1998

*THE REJECTIONS*

The Examiner rejected claims 40 to 60 and 63 to 67 under 35 U.S.C. § 112, second paragraph. The Examiner also entered the following prior art rejections: claims 40, 42, 43, 49, 50, 51, 60, 61 and 63 to 66 under 35 U.S.C. § 102(b) as anticipated by Blechl; claims 40, 42, 43, 46, 47, 63 and 66 under 35 U.S.C. § 102(b) as anticipated by Higham; claims 40,

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42, 43, 46 and 47 under 35 U.S.C. § 102(e) as anticipated by Kraft; claims 65 and 66 under 35 U.S.C. § 102(b) as anticipated by Williams '294; claims 40, 43, 45, 52, 53 and 56 under 35 U.S.C. § 103(a) as obvious over Pitel; claims 63 to 67 under 35 U.S.C. § 103(a) as obvious over the combination of Williams '294 and Higham; claims 40 to 43, 46, 47, 49, 52, 53, 54, 57, 58, 60, 62, 63, 66 and 67 under 35 U.S.C. § 103(a) as obvious over Higham; claims 40, 42, 43, 44, 46, 48 to 51, 55 and 59 to 67 under 35 U.S.C. § 103(a) as obvious over the combination of Blechl and Kraft; claims 40 to 43, 46, 47, 49, 50 to 54, and 57 to 67 under 35 U.S.C. § 103(a) as obvious over the combination of Higham and Blechl; claims 63 and 65 to 67 under 35 U.S.C. § 103(a) as obvious over the combination of Higham and Gardner; and claims 63, 64 and 66 under 35 U.S.C. § 103(a) as obvious over the combination of Higham and Halverson. (Answer, pp. 5 to 18).

Appellants have nominally indicated (Brief, page 8) that, for purposes of this appeal, the claims do not stand or fall



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together. For each ground of rejection, we will consider the claims separately only to the extent that separate arguments are of record in this appeal. Any claim not specifically argued will stand or fall with its base claim. See 37 CFR § 1.192(c)(7)(2003).

We have carefully reviewed the claims, specification and applied prior art, including all of the arguments advanced by both the Examiner and Appellants in support of their respective positions. This review leads us to conclude that the subject matter of claims 40 to 47, 49 to 54 and 56 to 67 is not patentable over the cited references. The subject matter of claims 48 and 55 is patentable over the cited references.

### *DISCUSSION<sup>2</sup>*

Our initial inquiry is directed to the scope of the claimed subject matter. During patent prosecution claims are to be given their broadest reasonable interpretation consistent with the specification and the claim language is to be read in view of the specification as it would be interpreted by one of ordinary skill in the art. *In re Morris*, 127 F.3d 1048, 1053-54, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997); *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989); *In re Sneed*, 710 F.2d 1544, 1548, 218 USPQ 385, 388 (Fed. Cir. 1983); *In re Okuzawa*, 537 F.2d 545, 548, 190 USPQ 464, 466 (CCPA 1976).

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<sup>2</sup> We note Appellants in the Brief assert that the Examiner's discussion of the rejections is defective. (Brief, pp. 9-11). Questions regarding actions taken by the Examiner, such as a defective/improper explanation of a rejection, are petitionable under 37 CFR § 1.181 to the Commissioner. Since Appellants have failed to timely file a petition, we will address the rejections as presented in the appeal. Moreover, Appellants state that they "have reviewed the references cited and have determined that for the reasons stated herein that the cited references, taken individually or as a whole, clearly do not teach or suggest the inventions recited in Appellants' claims." (Brief, p. 11).

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Independent claims 40, 52 and 53 are directed to a method performed in connection with a dispenser. In each claim, the dispenser includes a dispenser module that is movably mounted in supporting connection with an enclosure. The dispenser module is described as having a holder that enables the holding of medical items. The dispenser module is further described as having a dispenser mechanism. The specification, page 7, describes the dispenser mechanism as "for dispensing the items in the holder in response to electrical signals."

Independent claim 61 is directed to a method for dispensing a medical item. The method is performed in connection with an enclosure. The enclosure includes two dispenser modules that are movably mounted in supporting connection with an enclosure. The specification describes the dispenser module as "movable between first and second positions. In the first position the dispenser modules are housed within the enclosure and the second position the

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dispenser modules extend through the opening when the door is in the open position.” (Specification, p. 6).

#### REJECTIONS UNDER § 112

The Examiner must demonstrate that the claims do not “set out and circumscribe a particular area with a *reasonable* degree of precision and particularity.” *In re Moore*, 439 F.2d 1232, 1235, 169 USPQ 236, 238 (CCPA 1971), emphasis added. The purpose of the second paragraph of Section 112 is to basically insure an *adequate* notification of the metes and bounds of what is being claimed. See *In re Hammack*, 427 F.2d 1378, 1382, 166 USPQ 204, 208 (CCPA 1970).

The Examiner has rejected claims 40 to 60 and 63 to 67 under 35 U.S.C. § 112, second paragraph as indefinite.

According to the Examiner, the claims are indefinite because “the applicant has conjoined elements using ‘or’ creating vague and indefinite claims”. (Answer, p. 6).

We determine that the Examiner has not met the initial burden by failing to present any reasons why one of ordinary

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skill in the art would not be apprised of the scope of the claims on appeal. The use of the term "or" does not render the claimed subject matter indefinite. For example, the use of the term "or" in claim 42 indicates that either an item is added to the dispenser or an item is removed from the dispenser. Thus, the claims provide adequate notification of the metes and bounds of the claimed subject matter.

For the foregoing reasons and those set forth in the Brief, the rejection of claims 40 to 60 and 63 to 67 under 35 U.S.C. § 112, second paragraph, is reversed.

#### REJECTIONS UNDER § 102

In order for a claimed invention to be anticipated under 35 U.S.C. § 102, all of the elements of the claim must be found in one reference. *See Scripps Clinic & Research Found. v. Genentech Inc.*, 927 F.2d 1565, 1576, 18 USPQ2d 1001, 1010 (Fed. Cir. 1991). *In re Schreiber*, 44 USPQ2d 1429, 1433 (Fed. Cir. 1997). ("To anticipate a claim, a prior art

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reference must disclose every limitation of the claimed invention, either explicitly or inherently.” )

The Examiner rejected claims 40, 42, 43, 49, 50, 51, 60, 61 and 63 to 66 under 35 U.S.C. § 102(b) as anticipated by Blechl. We reverse.

Blechl describes a method performed in connection with a dispenser (10), the dispenser including a dispenser module (60) movably mounted in supporting connection with an enclosure, wherein the dispenser module includes a holder (90) enabling holding of medical items, wherein the dispenser module further includes a mechanism (68, 70, 72, 74, 82), wherein the dispenser mechanism is selectively operable to dispense medical items (108) from the holder, the method comprising: (a) moving the dispenser module [28 drawer], while mounted, from a first position, wherein the dispenser is within the enclosure, to a second position, wherein the holder extends outside the enclosure; (b) adding or removing at least one medical item from the holder while the holder

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extends outside the enclosure; and (c) moving the dispenser module from the second position to the first position wherein the holder is within the enclosure.

Appellants argue that the dispenser module of Blechl is not the same as used in the claimed method. Specifically, Appellants argue that "Blechl does not disclose moving a dispenser module, while mounted, including a 'holder' and 'a dispenser mechanism' in the manner recited. (Brief, p. 19).

The Examiner replies Blechl discloses a dispenser (10), a dispenser module (60), a holder (90), a dispenser mechanism (68, 70, 72, 74, 82) and medical items (108). (Answer, p. 21).

We agree with Appellants that Blech does not anticipate the subject matter of claim 40. Blechl discloses that the drawer (28) extends out of the enclosure. (See fig. 1). The dispenser module (60) which contains the holder (90) is not included in the portion of the module that extends outside of the enclosure. (See, col. 7). That is, the dispenser module

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(60) and the holder 90 at times of operation remain inside of the enclosure. (See figs. 2 and 11). The only part that extends out of the enclosure is drawer 28, which does not contain 60 or 90.

Blechl also does not anticipate the subject matter of claim 61 since Blechl does not disclose a plurality of drawers, i.e., dispenser modules.

For the above reasons the Examiner's rejection of claims 40, 42, 43, 49, 50, 51, 60, 61 and 63 to 66 under § 102(b) as anticipated by Blechl is reversed.

The Examiner rejected claims 40, 42, 43, 46, 47, 63 and 66 under 35 U.S.C. § 102(b) as anticipated by Higham. We affirm.

Higham discloses dispenser/enclosure (200), dispenser module (212 drawer) including a holder (216 bins) enabling holding of medical items, door (214) and a dispenser mechanism. (Cols 17-20).



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Higham discloses a method and apparatus for providing access to medical items which are dispensed and maintaining inventory control. The apparatus (Figure 10) [also note figure 2] comprises a dispenser (200) that encloses dispenser modules (212 drawer). Higham discloses the use of electrical signals to regulate the insertion and removal of items from the dispenser unit, i.e., a dispenser mechanism. The dispenser comprises a door (214) movably mounted in supporting connection with an enclosure. The dispenser modules include holders (216 bins) for medical items. Higham discloses that the drawers (dispenser module) are mounted in the enclosure (200). The drawers operate from a first position (closed) within the enclosure, to a second position (open), wherein the bins (holders) extend outside the enclosure. The operator can add or remove medical items from the bins while the bins extend outside the enclosure. Upon completion of adding or removing items from the bins, the drawer is moved from the open second position to the

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closed first position wherein the bins are within the enclosure.

Appellants argue that the Examiner's action is unclear. (Brief, p. 31). Appellants argue that they are unable to respond to the rejection because the Examiner has not identified the structural limitations. We do not find Appellants arguments persuasive. The Appellants acknowledge that the Examiner identified the elements of the dispenser shown in figure 10.

Appellants argue that Higham does not disclose the dispenser mechanism of claim 40. (Brief, pp. 32-33). The specification, page 7, describes the dispenser mechanism as "for dispensing the items in the holder in response to electrical signals." The Examiner has identified figures 32 to 36 as descriptive of the dispensing mechanism. Higham also discloses the use of electrical signals to regulate the insertion and removal of items from the dispenser unit. (Cols. 17 to 20). Particularly note the alternative

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embodiment in column 20, which discloses the dispensing of items can be controlled by the processor in response to the input by the user.

Appellants argue that claim 42 is patentable because Higham does not disclose manually adding or removing medical items from a holder in response to a dispenser mechanism. We do not agree. As stated above, Higham discloses a dispenser mechanism used in combination with the described apparatus. The purpose of the Higham apparatus is to regulate inventory. This is done by keeping track of the items added or removed from the dispensing device. (Note col. 19).

Appellants' arguments regarding claim 43 are not persuasive because Higham discloses a door 214 that opens to provide an access path for the drawer to move to an open position, i.e., the dispense location, where items are removed from the bins.

Appellants' arguments regarding claims 46 and 63 are not persuasive because Higham discloses visual indicators for

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identifying the contents of the inventory apparatus. Higham further discloses keeping track of items added or removed from the apparatus. (For example see column 6).

Appellants' arguments regarding claim 47 are not persuasive because Higham discloses the use of lids for the various bins in the secure systems that require input by the user prior to opening for access. (For example see columns 21 to 23).

Appellants' arguments regarding claim 66 are not persuasive because Higham discloses the drawers 212 contain various bins 216. The locations of these bins are in different proximity relative to the door 214.

For the above reasons we affirm the rejection of claims 40, 42, 43, 46, 47, 63 and 66 under § 102(b) as anticipated by Higham.

The Examiner rejected claims 40, 42, 43, 46 and 47 under 35 U.S.C. § 102(e) as anticipated by Kraft. We affirm the

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rejections of claims 40 and 42. However, we reverse the rejection of claims 43, 46 and 47.

Kraft discloses dispenser/enclosure (12), dispenser module (24 (a&b) drawer) that includes a holder (314 medication packages) enabling holding of medical items.

Kraft discloses a method and apparatus for maintaining inventory control and for providing access to medical items which are dispensed. The apparatus (Figure 2) comprises a dispenser (12) that encloses dispenser modules (24 a&b). The dispenser comprises drawers that are movably mounted in supporting connection with an enclosure. The dispenser modules include holders, the bottom of the drawer, wherein the packages (314) for medical items are dispensed. Kraft discloses that the drawers (dispenser module) are mounted in the enclosure (12). The drawers operate from a first position (closed) within the enclosure, to a second position (open), wherein the bins (packages) extend outside the enclosure. The operator can remove medical items from the

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drawer while the holder extends outside the enclosure. Upon completion of removing items from the bins, the drawer, including the holder, is moved from the open second position to the closed first position within the enclosure.

Appellants argue that Kraft does not disclose the dispenser mechanism of claim 40. (Brief, pp. 40-41). As stated when discussing Higham above, the specification describes the dispenser mechanism as "for dispensing the items in the holder in response to electrical signals." Kraft discloses a mechanism for transferring the medication from the bulk container (130) into the packages 314. These packages are subsequently transferred to the holder in the drawer. (See cols. 12-13). This process disclosed by Kraft would meet the requirements of claim 40.

Appellants argue that claim 42 is patentable because Kraft does not disclose manually adding or removing medical items from a holder in response to a dispenser mechanism. We do not agree. As stated above, Kraft discloses a dispenser

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mechanism used in combination with the described apparatus. The nurse using the apparatus removes the packages from the drawers.

We agree with Appellants that Kraft does not anticipate the subject matter of claims 43, 46 and 47. Kraft discloses visual indicators (26) for identifying the contents of the inventory apparatus. However, it is not clear that the display provides an indication as to the contents of the packages as required by claim 46. Kraft does not disclose a door that encloses and interior area as required by claim 43. Kraft fails to disclose a cover for the dispenser module as required by claim 47.

The Examiner rejected claims 65 and 66 under 35 U.S.C. § 102(b) as anticipated by Williams. We affirm the rejection of claim 65 and reverse the rejection of claim 66.<sup>3</sup>

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<sup>3</sup> We note that the Examiner has not rejected the subject matter of claim 40 over Williams. In the event of further prosecution, the Examiner should also reject the subject matter of claim 40 over the Williams reference.

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Williams discloses a dispenser station (1), dispenser module (drawer 59) slidably mounted with respect to the dispenser station housing enclosure (3). The dispenser module includes holders (subcompartment (65a-f) containing movable magazines (81) including individual open cups(109) for containing single dispensable pharmaceutical items. Williams includes a dispenser mechanism (computer controlled solenoid (143) used to load and unload the magazine. Williams discloses the use of a latch (151) that engages a latching pin (locking bar (155)) that allows the drawer to be pulled open from a first position to a second position for loading and unloading the dispenser module.

Appellants argue that the dispensing in Williams is done manually and not by using a selectively operable dispenser mechanism to mechanically dispense a plurality of medical items from a holder. (Brief, p. 47). This argument is not persuasive because it is not limited to the scope of the claimed invention. That is, the subject matter of the



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claimed invention does not preclude manually removing the item from the dispenser module.

Appellants also argue that the dispense locations of Williams are not in a different proximity as required by the invention of claim 66. We agree. When the dispenser module is open, as described in column 9, the holders which contain the medical items have a different proximity relative to the front of the dispenser module. However, Williams does not disclose a door in front of the dispenser module.

#### THE § 103 REJECTIONS

The Examiner rejected claims 40, 43, 45, 52, 53 and 56 under 35 U.S.C. § 103(a) as obvious over Pitel. Pitel describes a vending machine. The Examiner took official notice that it would have been obvious to stock the vending machine with medical items. The Examiner has supplied references to support the taken official notice. We affirm the rejection of claims 40, 43, 45, 52, 53 and 56.

Pitel discloses a method and vending apparatus for providing access to items which are dispensed. The apparatus (Fig. 1) comprises a dispenser (10) that encloses dispenser modules (36, 38, 40, 42) and dispenser mechanism (Figs. 10 and 11; col. 5). The dispenser comprises shelves (36, 38, 40, 42) that are movably mounted in supporting connection with an enclosure. The dispenser modules include holders, delivery units (44), for items. Pitel discloses that the shelves (dispenser module) are mounted in the enclosure (12). The shelves operate from a first position (closed) within the enclosure, to a second position (open), wherein the delivery units extend outside the enclosure. The operator opens the door (20) to remove (or replace) items on the shelves while the packages extend outside the enclosure. Upon completion of removing (or replacing) items from the delivery units, the shelf is moved from the open second position to the closed first position within the enclosure.

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Appellants argue that Pitel lacks "at least one medical item" as required by the rejected claims. (Brief, p. 83). Appellants' argument is not persuasive because the Pitel reference was not relied upon by the Examiner for teaching this feature. The Examiner cited several references to support his assertion that the dispensing of medical items from a vending machine was well known. For example, the Patterson reference discloses that vending machines were used to dispense medical items such as aspirin and bandages. (Page 4). Thus, a person of ordinary skill in the art would have found the use of a vending machine, such as disclosed by Pitel, suitable for dispensing medical items.

Appellants' arguments regarding the helix arrangement in the vending apparatus of Pitel are not persuasive. (Brief, p. 84-85). Appellants argue that the helixes of Pitel are limited to dispensing bagged snacks. There is no evidence to support Appellants' arguments. Pitel describes a vending machine that is suitable for delivering a variety of articles

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including light articles. (Col. 1). Appellants' arguments regarding the size of the aspirin packages are not persuasive because the claims are not limited to a particular size product. Moreover, Pitel discloses that an article supporting bar is employed in the helix arrangement to aid in dispensing the items. (Col. 4).

Appellants argue that "it would not have been obvious to place a secure environment item into an insecure environment." (Brief, p. 85) This argument is not relevant to the subject matter of the claimed invention. Appellants have not directed us to evidence that a vending machine that comprises over the counter medical items such as aspirin, antacids and bandages must be kept in a secure environment.

Appellants' arguments for the individual claims 40, 43, 45, 52, 53 and 56 are all premised on the failure of Pitel to disclose a medical item. The obviousness of including a medical item in a vending machine has been discussed above. The various structural features of the apparatus used in

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the claimed invention are described by Pitel. It has not been disputed that Pitel discloses that items are dispensed from the vending apparatus.

Appellants argue that Pitel does not disclose a path, delivery area and dispense location as required by claim 43. (Brief, p. 87). This argument is not persuasive. Pitel discloses a door 20 that opens and provides an access path to the delivery area for reloading or removing items from the shelves.

Pitel discloses that the holder includes a pair of rotatable helixes. (Col. 4). This disclosure would render the subject matter of claims 45 and 56 unpatentable.

The Examiner rejected claims 63 to 67 under 35 U.S.C. § 103(a) as obvious over the combination of Williams and Higham. We have determined that the subject matter of claims 63 and 66 is not patentable over the disclosure of Higham alone. We also determined that the subject matter of claim 65 is not patentable over the Williams reference alone.

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Thus, we will affirm the rejection of claims 63, 65 and 66 for the reasons presented above.<sup>4</sup>

Appellants argue that "neither Williams nor Higham alone or in combination disclose or suggest the recited features of claim 64, which depends on claim 46." (Brief, p. 114). We do not agree. As stated above, the subject matter of claim 46 is anticipated by Higham. Higham discloses visual indicators for identifying the contents of the inventory apparatus. The relationship of the indicia on the visual display described by claim 64 would have been obvious to a person of ordinary skill in the art because Higham discloses that the visual display provides a list of the items held by the unit and space is provided for selecting specific items. (Col. 6). Moreover, the arrangement of indicia on the visual display for easy identification, including use of a side-by-

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<sup>4</sup> Anticipation is the epitome of obviousness, see *In re Baxter Travenol Laboratories*, 952, F.2d 388, 391, 21 USPQ2d 1281, 1284-85 (Fed. Cir. 1991); *In re Fracalossi*, 681 F.2d 792, 794, 215 USPQ 569, 571 (CCPA 1982); *In re May*, 574 F.2d 1082, 1089, 197 USPQ 601, 607 (CCPA 1978).

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side arrangement would have been obvious to a person of ordinary skill in the art.

The subject matter of claim 67 would have been obvious to a person of ordinary skill in the art. A person of ordinary skill in the art would have determined that the attachment of items to a supporting surface would have allowed the item to be easily displayed, easily identified and easily dispensed. The Examiner asserts that Higham describes medical items that are prepackaged including a support card (item 52) which are attached for display on pegs. (Answer, pp. 13-14).

Appellants have not specifically addressed the Examiner's position that medical items are often attached to support cards in either the Brief or Reply Brief. The Appellants argue that Higham does not disclose the dispensation of a medical item including a support card in the manner recited. (Brief, p. 116). This argument is not persuasive. Higham describes medical items attached to support cards. The item

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is held by a peg holder in the dispenser module. (See for example Figure 3C).

The Examiner has taken official notice that the use of cylindrical holding containers was well known in the art.<sup>5</sup> (Answer, p. 14). The Appellants have not challenged the Examiner's position in the discussion of claim 67 on page 116 of the Brief.

The Examiner rejected claims 40 to 43, 46, 47, 49, 52, 53, 54, 57, 58, 60, 62, 63, 66 and 67 under 35 U.S.C. § 103(a) as obvious over Higham.

We affirmed the rejection of claims 40, 42, 43, 46, 47, 63 and 66 under 35 U.S.C. § 102(b) as anticipated by Higham. (See discussion of 102 rejection above). Thus, we will limit our discussion to claims 41, 49, 52, 53, 54, 57, 58, 60, 62 and 67.

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<sup>5</sup> The Examiner has identified the Blechl reference as describing a cylindrical holding container in a separate rejection. (Answer, p. 16).



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Appellants argue that the subject matter of claim 41 is patentable because Higham does not disclose closing the door. (Brief, p. 49). This argument is not persuasive. After the operator completes adding or removing medical items from the bins, the drawer is moved from the open second position to the closed first position wherein the bins are within the enclosure. The closing of the door would have been the obvious final step to a person of ordinary skill in the art.

The subject matter of claim 49 would have been obvious to a person of ordinary skill in the art. Higham discloses a dispenser containing a variety of dispenser modules. (See figures 1 to 5). As stated above when discussing claim 67, the Examiner asserts that Higham describes medical items that are prepackaged including a support card (item 52) which are attached to holders for display on pegs. A person of ordinary skill in the art would have determined that the attachment of items to a supporting surface would have

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allowed the items to be easily displayed, easily identified and easily dispensed.

Appellants' discussion regarding the disclosure of cylindrical holders and the ability to dispense them in the manner claimed is not persuasive. (Brief, p. 50). Higham's figures 5 and 22 depict cylindrical holders. The contents of the holders can not be discerned from the figures.<sup>6</sup> Nonetheless, we disagree with the Appellants that the container could not be dispensed in the manner recited for the reasons stated above regarding the dispensing of the items in the Higham dispenser.

Appellants argue that Higham does not disclose or suggest the dispenser, dispenser mechanism, and the method recited by claims 52, 53, 54 and 57. (Brief, pp. 51-53). These

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<sup>6</sup> The placing of liquids in the test tube like container (260) or the jar like container depicted in figure 5 would have been within the level of ordinary skill in the art.

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arguments are not persuasive for the reasons stated above in the discussion of the § 102 rejection.<sup>7</sup>

Appellants' arguments regarding claim 58 are not persuasive because of the discussion of figure 7 appearing in column 20 of Higham.

Appellants' arguments regarding claim 62 are not persuasive. As stated above, Higham discloses or suggests all of the elements of claim 62. Higham discloses a dispenser/enclosure, a door, and a dispenser module including holders. Higham discloses multiple dispenser modules, see figures 3-7, including medical items attached to support cards. Higham's figures 5 and 22 depict cylindrical holders. The Higham reference is suggestive of a dispenser capable of holding cylindrical containers and items attached to support cards. Thus, the method of dispensing medical items from different dispenser modules containing cylindrical containers

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<sup>7</sup>Appellants' specific arguments are limited to elements discussed with the claims 40, 42, 43, 46, 47, 63 and 66.

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and dispenser modules containing medical items on a supporting would have been obvious to a person of ordinary skill in the art.

Appellants' arguments regarding claim 67 are not persuasive for the reasons discussed above regarding claim 62.

The Examiner rejected claims 40, 42, 43, 44, 46, 48 to 51, 55 and 59 to 67 under 35 U.S.C. § 103(a) as obvious over the combination of Blechl and Kraft. We have determined that the subject matter of claims 40 and 42 is not patentable over the disclosure of Kraft. Thus, we will affirm the rejection of claims 40 and 42 for the reasons presented above. We also determined that claims 40, 42, 43, 49, 50, 51, 60, 61 and 63 to 66 are not anticipated by Blechl and claims 43, 46 and 47 are not anticipated by Kraft. (See discussion of the 102 rejections above).

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The subject matter of claims 61, 64 and 65 would have been obvious to a person of ordinary skill in the art.

Kraft discloses a method and apparatus for providing access to medical items which are dispensed and maintaining inventory control. As stated in the discussion of the Kraft reference above, Kraft's apparatus comprises a dispenser that encloses dispenser modules (24 a&b). The dispenser comprises drawers which are movably mounted in supporting connection with an enclosure. The dispenser modules include holders and the bottom of the drawer, wherein the packages (314) for medical items are dispensed. Kraft discloses that the drawers (dispenser module) are mounted in the enclosure (12). The drawers operate from a first position (closed) within the enclosure, to a second position (open), wherein the bins (packages) extend outside the enclosure. The operator can remove medical items from the drawer while the holder extends

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outside the enclosure. Thus, the method of claim 61 is not patentable over the disclosure of Kraft.

Kraft discloses visual indicators for identifying the contents of the dispenser apparatus. The relationship of the indicia on the visual display described by claim 64 would have been obvious to a person of ordinary skill in the art because Kraft discloses that visual display is connected to the computer hardware. (Col. 4). Moreover, the arrangement of indicia on the visual display for easy identification, including use of a side-by-side arrangement would have been obvious to a person of ordinary skill in the art. Thus, the method of claim 64 would have been obvious to a person of ordinary skill in the art over the disclosure of Kraft.

The subject matter of claim 65 would have been obvious to a person of ordinary over the disclosure of Kraft. Kraft discloses that the drawer 24 is normally locked in the first position. (Col. 5). However, Kraft does not disclose the

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locking means. A person of ordinary skill in the art would have recognized that the use of a latching lever and latch pin are conventional locking means for a drawer.<sup>8</sup>

We agree with Appellants, Brief, pages 90 to 99, that the subject matter of claims 43, 44, 46, 48 to 51, 55 59, 60, 62, 63, 66 and 67 is not obvious over the combination of Blechl and Kraft. For example, the holder contained in the apparatus of Blechl during operation remains inside of the enclosure.<sup>9</sup> Consequently, we agree with Appellants, Brief pages 92 and 93, that there is no reason for adding a helix to the device of Blech. We also agree with the remainder of Appellants arguments regarding the rejection of claims 43, 44, 46, 48 to 51, 55, 59, 60, 62, 63, 66 and 67 over the combination of Blechl and Kraft.

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<sup>8</sup> We recognize that the Examiner has identified known locking means in the discussion of the Williams reference above.

<sup>9</sup> See discussion of the 102 rejection above.

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The Examiner rejected claims 40 to 43, 46, 47, 49, 50 to 54, and 57 to 67 under 35 U.S.C. § 103(a) as obvious over the combination of Higham and Blechl.

We affirmed the rejection of claims 40, 42, 43, 46, 47, 63 and 66 under 35 U.S.C. § 102(b) as anticipated by Higham and claims 41, 49, 52, 53, 54, 57, 58, 60, 62 and 67 under 35 U.S.C. § 103(a) as obvious over Higham.<sup>10</sup> Thus, we will limit our discussion to claims 50, 51, 59, 61, 64, 65.

The subject matter of claim 61 is not patentable over the combination of Higham and Blechl. Higham discloses or suggests all of the elements of claim 61. Specifically, Higham discloses a dispenser/enclosure, a door, and a dispenser module including holders. Higham discloses multiple dispenser modules, see figures 3-7, including medical items attached to support cards. Higham's figures 5 and 22 depict cylindrical holders. Blechl describes

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<sup>10</sup> See discussion of the 102 and 103 rejections above.



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cylindrical containers capable of holding liquid items.

(Col. 8). The Higham reference is suggestive of a dispenser capable of holding cylindrical containers and items attached to support cards. Thus, the method of dispensing medical items from different dispenser modules containing cylindrical containers and dispenser modules containing medical items on a support card would have been obvious to a person of ordinary skill in the art.

The subject matter of claim 64 is not patentable over the combination of Higham and Blechl. As stated above, the subject matter of claim 46 is anticipated by Higham. Higham discloses visual indicators for identifying the contents of the inventory apparatus. The relationship of the indicia on the visual display described by claim 64 (a dependent claim of claim 46) would have been obvious to a person of ordinary skill in the art because Higham discloses that visual display provides a list of the items held by the unit and space is

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provided for selecting specific items. (Col. 6). Moreover, the arrangement of indicia on the visual display for easy identification, including use of a side-by-side arrangement would have been obvious to a person of ordinary skill in the art.

The subject matter of claim 65 would have been obvious to a person of ordinary over the disclosure of Higham. Higham discloses that the drawers of the dispenser unit normally remain locked in the first position. (Col. 7). However, Higham does not disclose the locking means. A person of ordinary skill in the art would have recognized that the use of a latching lever and latch pin are conventional locking means for a drawer.

We agree with Appellants, Brief, pages 103 to 105 and 107 to 108, that the subject matter of claims 50, 51, 59 is not obvious over the combination of Higham and Blechl. The

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Examiner has not adequately explained the motivation for combining the teaching of these references.

The Examiner rejected claims 63 and 65 to 67 under 35 U.S.C. § 103(a) as obvious over the combination of Higham and Gardner.<sup>11</sup> We have determined that the subject matter of claims 63, 66 and 67 is not patentable over the disclosure of Higham.<sup>12</sup> Thus, we will limit our discussion to claim 65.

The subject matter of claim 65 would have been obvious to a person of ordinary over the disclosure of Higham. Higham discloses that the drawers of the dispenser unit normally remain locked in the first position. (Col. 7). However, Higham does not disclose the locking means. A person of

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<sup>11</sup> We note Appellants consider this rejection to be a new rejection. (Brief, pp. 109-110 and Reply Brief, pp. 4-5). As stated above, questions regarding actions taken by the Examiner, such as the insertion of a new ground of rejection, are petitionable under 37 CFR § 1.181 to the Commissioner. Since Appellants have failed to timely file a petition, we will address this rejection as presented in the Examiner's Answer. Moreover, Appellants have substantively replied to the rejection in the Reply Brief.

<sup>12</sup> See discussion of the 102 and 103 rejections above.

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ordinary skill in the art would have recognized that the use of a latching lever and latch pin are conventional locking means for a drawer. The Gardner reference is evidence that the claimed latching means is known by persons of ordinary skill in the art.

The Examiner rejected claims 63, 64 and 66 under 35 U.S.C. § 103(a) as obvious over the combination of Higham and Halverson. We have determined that the subject matter of claims 63, 64 and 66 is not patentable over the Higham reference. The addition of the Halverson reference would not detract from this determination. Thus, for the reasons presented above we affirm this rejection.

Based on our consideration of the totality of the record before us, having evaluated the appealed rejections in view of Appellants' arguments, we conclude that the subject matter of claims 40 to 47, 49 to 54 and 56 to 67 is not patentable

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over the cited references. The subject matter of claims 48 and 55 is patentable over the cited references.

### *CONCLUSION*

We affirm the rejections of the following claims:  
claims 40 and 42 under § 102 over Kraft; claims 40, 42, 43, 46, 47, 63 and 66 under § 102 over Higham; claim 65 under § 102 over Williams; claims 40, 43, 45, 52, 53 and 56 under § 103 over Pitel; claims 40, 42, 61, 64 and 65 under § 103 over the combination of Blechl and Kraft; claims 40 to 43, 46, 47, 49, 52, 53, 54, 57, 58, 60, 62, 63, 66 and 67 under § 103 over Higham; claims 40 to 43, 46, 47, 49, 50 to 54, and 57 to 67 under § 103 over the combination of Higham and Blechl; claims 63 to 67 under § 103 over the combination of Williams and Higham; claims 63 and 65 to 67 under § 103 over the combination of Higham and Gardner; and claims 63, 64 and 66 under § 103 over the combination of Higham and Halverson.

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We reverse the rejections of the following claims:  
claims 40, 42, 43, 49, 50, 51, 60, 61 and 63 to 66 under §  
102 over Blechl; claims 43, 44, 46, 48 to 51, 55 and 59, 60,  
62, 63, 65, 66 and 67 under § 103 over the combination of  
Blechl and Kraft; claims 43, 46 and 47 under § 102 over  
Kraft; and claim 66 under § 102 over Williams. We also  
reverse the rejection of claims 40 to 60 and 63 to 67 under  
§ 112, second paragraph.

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### Time for taking action

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART

*Terry J. Owens*  
TERRY J. OWENS  
Administrative Patent Judge

  
CATHERINE TIMM  
*Administrative Patent Judge*

  
JEFFREY T. SMITH  
*Administrative Patent Judge*

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